Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ACS of Alaska Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc.	)	
Petition to Amend Section 51.405 of the Commission's Rules to Implement the Eighth Circuit's Decision in *Iowa Utilities Board v. FCC* Regarding the Burden of Proof in Rural Exemption Cases Under Section 251(f)(1) of the Communications Act	)	CC Docket No. 96-98

PETITION FOR RULEMAKING

I. INTRODUCTION & SUMMARY

ACS of Alaska, Inc. (f/k/a "Telephone Utilities of Alaska, Inc."), ACS of Fairbanks, Inc. (f/k/a "PTI Communications, Inc.") and ACS of the Northland, Inc. (f/k/a "Telephone Utilities of the Northland, Inc.") (collectively "ACS"),[1] by their attorneys hereby request that the Commission issue an order revising Section 51.405 of its rules to ensure uniform nationwide implementation of the decision of the Eighth Circuit in *Iowa Utilities Board v. FCC* governing the proper allocation of the burden of proof in rural exemption cases under Section 251(f)(1) of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"). ACS requests this relief on an expedited basis in order to provide clarification in a case pending before the Alaska courts. Pursuant to Sections 1.407 and 1.412(c) of the Commission's rules, the Commission may adopt such a ministerial order without prior public notice and opportunity for comment, which is unnecessary in this matter. An expedited order would serve the public interest by preventing inconsistent treatment of carriers in rural exemption cases.

II. BACKGROUND

A. *The Rural Exemption, Section 51.405 and the Eighth Circuit's Ruling*

Section 51.405 of the Commission's rules was adopted as part of the Commission's implementation of Section 251(f) of the Communications Act, a new provision in 1996.[2] Section 251(f)(1)(A) of the Act provides rural telephone companies an exemption from some of the interconnection obligations under Section 251 of the Act, specifically the network unbundling requirements of subsection (c) under certain circumstances. Section 251(f)(1)(B) provides that states may terminate that exemption in certain cases. The Commission adopted Section 51.405(a) and (c) of the rules to clarify the burden of proof in cases where a carrier's rural exemption is challenged.[3] The Eighth Circuit ruled that in Section 51.405(a) the Commission improperly assigned that burden to the carrier claiming the exemption. Based on the plain meaning of the language in Section 251(f)(1)(A) of the Act, the court concluded that the only reasonable reading of the statute would be to assign the burden of proof to the party challenging the exemption. The court also ruled that in Sections 51.405(c) and (d), the Commission improperly limited the protection Congress intended to give to small and rural telephone companies by eliminating consideration of the "economic burden that is typically associated with efficient competitive entry."[4] Based on the plain language of the statute, the court determined that Congress intended an assessment of the full economic burden on the rural incumbent carrier. The court accordingly vacated Sections 51.405(a), (c) and (d) of the

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[1] The three joint petitioners are all rural telephone companies and all are wholly-owned subsidiaries of Alaska Communications Systems Group, Inc.

[2] 47 U.S.C. § 251(f).

[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16118 (1996) (subsequent history omitted).

[4] *Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 761 (8th Cir. 2000) ("*Iowa Utilities Board II*")

Commission's rules.[5] The Commission did not seek *certiorari* on this particular holding in *Iowa Utilities Board II*; two other parties did, but the Supreme Court denied review on this issue.[6]

B. *The Fairbanks and Juneau Cases*

ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. all are rural telephone companies within the meaning of the Communications Act.[7] As such, they qualify for the Section 251(f)(1)(A) exemption from the unbundling and resale obligations under Section 251(c) of the Act.[8] In 1997 a petition was filed before the Alaska Public Utilities Commission ("APUC") by one of ACS's competitors in the local exchange market in Alaska, General Communications, Inc. ("GCI"), seeking termination of ACS's rural exemption in Fairbanks, Juneau and the surrounding areas. On January 8, 1998, APUC denied GCI's petition to terminate ACS's rural exemptions. GCI appealed, and on March 4, 1999, the Alaska Superior Court found that the APUC had incorrectly assigned GCI the burden of proof. Finding that the Act did not assign the burden of proof in such cases, the court remanded the case to the APUC with instructions to place the burden of proof on ACS.[9] On June 30, 1999, the APUC issued an order terminating the rural exemption as to these LECs. On October 11, 1999, the Regulatory Commission of Alaska (RCA) (the agency successor to the APUC) granted reconsideration of

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[5] *Id.* at 762.

[6] *Petition for Writ of Certiorari* at I, *FCC v. Iowa Utilities Bd.*, 121 S.Ct. 878 (2001) (No. 00-587); *Petition for Writ of Certiorari* at i, *AT&T Corp. v. Iowa Utilities Bd.*, 121 S.Ct. 878 (2001) (No. 00-590) (urging that review of Section 251 issues was of "national importance"); *see also Reply Brief for Petitioner* at 7, *General Communications, Inc. v. Iowa Utilities Board*, 121 S.Ct. 879 (2001) (No. 00-602) (arguing that review of Section 251 issues was "immensely significant"). The Commission in its brief did support the petitions of AT&T and GCI for *certiorari*. *Brief for the FCC and the United States* at 17, *Verizon Communications v. FCC*, No. 00-511 (Nov. 17, 2000).

[7] 47 U.S.C. § 153(37).

[8] 47 U.S.C. § 251(f)(1).

the APUC's order but again terminated ACS's rural exemptions, allocating the burden of proof to ACS in a manner that expressly followed Section 51.405 of this Commission's rules, and adopted the Commission's "undue economic burden" test under 51.405(d). [10]

On September 1, 1999, ACS filed petitions with the RCA pursuant to Section 251(f)(2) of the Act, seeking partial suspension or modification of Section 251(c)'s requirements as applied to ACS of Fairbanks, ACS of Alaska and the North Pole service area of ACS of the Northland. ACS proposed that those companies would offer interconnection, discounted wholesale service, and certain unbundled network elements in the Fairbanks and Juneau-Douglas markets pursuant to state interconnection tariffs, but sought relief from some of the negotiation and arbitration provisions of Section 251(c), and also sought reduced regulation comparable to that applied to competitive local carriers. In a Bench Order issued October 15, 1999, confirmed October 26, 1999 in a full written opinion, the RCA dismissed ACS's petition. Therefore, pursuant to the mandate of the RCA, ACS has engaged in interconnection negotiations and subsequent arbitration with GCI, and on October 5, 2000, the RCA issued final orders affirming the interconnection terms resulting from the Fairbanks and Juneau-Douglas arbitrations. The company has appealed these RCA decisions.

On November 10, 1999, ACS filed an appeal in Alaska Superior Court of the RCA's order terminating the Fairbanks and Juneau rural exemptions, and on November 12, 1999, ACS filed an appeal in the same court of the RCA's order dismissing ACS's tariffed interconnection proposal. The issues were briefed in the Alaska court in 2000. On February 22, 2001 ACS filed a Motion to Vacate the Superior Court's March 4, 1999 order and the underlying

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[9] *GCI Communications Corp. v. Alaska Pub. Util. Comm'n,* No. 3AN-98-04759 CI (Alaska Super. Ct. Mar. 4, 1999) slip op. at 5.

RCA orders terminating ACS's rural exemptions. On February 6, 2001, ACS filed a Motion for Stay of the RCA's orders pending appeal, which was denied on February 9, 2001.[11] Although ACS cited the Eighth Circuit's ruling in *Iowa Utilities Board II* and noted that the Supreme Court had recently denied *certiorari* on the question of the burden of proof in rural exemption termination cases, the Alaska Superior Court ruled, "The 8th Circuit decision *in Iowa Utilities Board v. FCC*, 219 F. 3d 744 (8th Cir. 2000) does not require a stay, nor is it persuasive of the merits of a stay."[12]

III. NEED FOR A NATIONAL RULE REGARDING THE BURDEN OF PROOF IN RURAL EXEMPTION CASES

At present, the proper allocation of the burden of proof in rural exemption termination cases is governed by no Commission rule. The Eighth Circuit vacated the Commission's rules on this point, and the Supreme Court declined to take up the matter. While ACS has pointed out to the Regulatory Commission of Alaska and the Alaska Superior Court the finality of the Eighth Circuit's ruling on this question, the Alaska authorities so far have not felt compelled to follow the federal court. While ACS is vigorously pursuing its cause in higher Alaska courts, ACS is unlikely to get a favorable ruling before it is required to unbundle its network as required by the RCA's interconnection decisions and, as noted above, ACS has been unable to obtain a stay of those orders. Once ACS incurs the expense of modifying its network and processes, any subsequent legal victory will be of little value. ACS therefore urgently seeks revisions to Section 51.405 of the Commission's rules before these rural telephone companies

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[10] *Order Granting Reconsideration and Terminating Rural Exemption*, U-97-82 (11), U 97-143(11), U-97-144(11) (Reg. Comm. of Alaska, Oct. 11, 1999) at 12-13.

[11] *Telephone Utilities of Alaska, Inc. v. Regulatory Comm'n of Alaska*, No. 3AN-99-3494 (Alaska Super. Ct. Feb. 9, 2001) (order denying stay) (attached as Exhibit A).

[12] *See* Exhibit A.

are forced to unbundle their networks. Granting this petition will ensure that the Eighth Circuit's holding as to the correct reading of Section 251(f)(1) will become the law of *all* the land, including Alaska.

The Commission has acknowledged that the purpose of national standards for Section 251 is to give guidance to parties regarding their rights and obligations under this section.[13] While the Commission largely left interpretation of the requirements of Section 251(f) to the states, it gave specific guidance with respect to which party has the burden of proving the requirements for rural exemption termination.[14] In implementing a nationwide standard for this burden, the Commission demonstrated that it recognizes the importance of maintaining consistent treatment of this aspect of Section 251(f).[15] That the Alaska authorities looked to the Commission's reading of the statute underscores the urgency of adopting a new rule to ensure that Section 251(f)(1) is correctly and consistently implemented in accordance with the Eighth Circuit's order in *Iowa Utilities Board II*.

IV. PRECEDENT FOR COMMISSION RULING WITHOUT PRIOR NOTICE & COMMENT

The Commission may, in response to a petition for rulemaking, issue a final order amending its rules where notice and comment on the petition are not required.[16] Under the Commission's rules and the Administrative Procedure Act, the Commission may adopt rule changes without prior notice and comment "in any situation in which the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the

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[13] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15534 (1996).

[14] *First Report and Order* at 16113.

[15] *Id.* at 15527 ("Certain national rules are consistent with the terms and the goals of the statute").

[16] 47 C.F.R. § 1.407.

public interest."[17] Because the U.S. appeals court's ruling is unquestionably binding upon the Commission, and the only rule the Commission could possibly adopt would be one consistent with the court's holding in *Iowa Utilities Board II*, ACS submits that prior notice and opportunity for public comment are unnecessary in this case, and that good cause exists for the Commission to make such finding. Moreover, good cause exists for the Commission to find that it would be contrary to the public interest for it to delay such an inevitable ruling by seeking public input, given the imminence of the Alaska unbundling deadline and the importance, discussed above, of nationwide uniformity regarding the party bearing the burden of proof under Section 251(f)(1).

The Commission has adopted changes to its rules without prior notice and opportunity for public participation when such procedures were deemed unnecessary. In implementing amendments to Section 254(k) of the Telecommunications Act of 1996, the Commission adopted Section 64.901(c) of the rules without prior notice and comment, finding that they were unnecessary due to the clear mandate of the statute.[18] Because the rule change merely codified the requirements of the Act, the Commission found that it involved no discretionary action, thereby making notice and comment procedures unnecessary. There, as here, the outcome of the Commission's ruling was inevitable. Further, the Commission has amended rules without notice and comment where a court decision has invalidated a

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[17] 47 C.F.R. § 1.412(c). The Commission's rule further provides: "The finding of good cause and a statement of the basis for that finding are in such situations published with the rule changes." *Accord* 5 U.S.C. § 553(b)(3)(B).

[18] *Implementation of Section 254(k) of the Communications Act of 1934, as amended*, Order, 12 FCC Rcd. 6415 (1997) (codifying Section 254(k) prohibitions on cross-subsidization of competitive services with non-competitive services for ILECs to give "the fullest effect of to the Act's prohibitions" at 47 C.F.R. § 64.901(c)).

Commission policy. In such a case, the Commission has held that no purpose would be served by initiating notice and comment proceedings to amend the rules.[19]

The Commission also has dispensed with notice and comment in adopting rule changes on remand from a court of appeals, when it was impracticable for the Commission to obtain public input prior to the court's mandate taking effect, and the public interest would not be served by a delay.[20] Similarly, pursuant to Section 553(a) of the APA, where military or foreign affairs function of the United States were impacted, the Commission has dispensed with public notice and comment, even where doing so resulted in the relocation of FCC licensees to new spectrum, because of the inevitability of the result, and because "piecemeal resolution" of the issues would not have served the public interest.[21]

It is clear that the Commission must and will follow the Eighth Circuit's rule in any rural exemption case in the future. Seeking prior comment is therefore entirely unnecessary. Moreover, as the Commission acknowledged when it first adopted Section 51.405, there is a clear public benefit in having a national rule allocating the burden of proof in rural exemption

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[19] *Tariff Filing Requirements for Nondominant Common Carriers*, Order, 12 FCC Rcd. 13,653 (1995) (amending Section 45.51(b) to delete references to forbearance in order to conform to an earlier court decision invalidating the Commission's forbearance policy).

[20] *Federal-State Joint Board on Universal Service*, Sixteenth Order on Reconsideration in CC Docket No. 96-45, FCC 99-290, para. 16 (Oct. 8, 1999).

[21] *See, e.g., Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, 12 FCC Rcd. 3471 (1997), *as corrected by Erratum*, 12 FCC Rcd. 4990 (1997), *aff'd on recon.*, Memorandum Opinion and Order in ET Docket No. 97-99, 13 FCC Rcd 15147 (1998) (operation of DEMS facilities posed a risk of interference to military satellite earth stations in Washington, D.C. and Denver, Colorado; spectrum was offered by NTIA to relocate DEMS licensees and thereby remove the source of potential interference to the military system; other would-be users of that newly offered spectrum objected to the lack of public participation; the Commission denied reconsideration saying, "The spectrum was not available for any other purpose. Public rulemaking proceedings would not have altered these facts or enlarged the possible uses of that spectrum.").

cases, and avoiding disparate procedural rules in enforcement of this part of the statute.[22] For these reasons, ACS urges the Commission to give courts and regulators around the country appropriate federal guidance, and codify the Eighth Circuit's rule on burden of proof under Section 251(f)(1) of the Act.

V. CONCLUSION – RELIEF REQUESTED

For the foregoing reasons, ACS urgently requests that the Commission issue an Order, without prior notice and comment, adopting a new Section 51.405(a) of its rules as follows:

> (a) In a bona fide request for interconnection, services, or access to unbundled network elements, the burden of proof shall be on the requesting party to prove to the state commission that the rural telephone company is not entitled, pursuant to Section 251(f)(1) of the Act, to continued exemption from the requirements of Section 251(c) of the Act, including the burden of proving that the application of Section 251(c) as requested would not be unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act (other than subsections (b)(7) and (c)(1)(D)).

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[22] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16113 (1996).

In granting this petition, the Commission will effectuate the mandate of the Eighth Circuit and ensure uniformity in the interpretation of Section 251(f)(1) of the Communications Act throughout the country.

Respectfully submitted,

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ACS OF THE NORTHLAND, INC.

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March 5, 2001

ACS of Alaska Inc.,
ACS of Fairbanks, Inc., and
ACS of the Northland, Inc.

Petition to Amend Section 51.405
of the Commission's Rules
to Implement the Eighth Circuit's
Decision in *Iowa Utilities Board v.*
FCC Regarding the Burden of Proof
in Rural Exemption Cases Under
Section 251(f)(1) of the
Communications Act

Petition for Rulemaking in CC Docket No. 96-98

Exhibit A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

TELEPHONE UTILITIES OF ALASKA, INC.; TELEPHONE UTILITIES OF THE NORTHLAND, INC.; and, PTI COMMUNICATIONS OF ALASKA, INC.		
Appellants,		
vs.	Case Nos.	3AN-99-3494 3AN-99-3499 Consolidated
REGULATORY COMMISSION OF ALASKA and STATE OF ALASKA,		
Appellee,		
And GENERAL COMMUNICATION CORP.		
Additional Appellee.		

ORDER

The motion of appellant ACS for a stay of the October 11, 1999 Regulatory Commission of Alaska order is **DENIED**.

The 8th Circuit decision in Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000) does not require a stay, nor is it persuasive of the merits of a stay.

It is so **ORDERED**.

Dated this 9th day of February, 2001, in Anchorage, Alaska.

I certify that on 2-9-01
a copy of the above was mailed/delivered
to each of the following at their addresses
of record: S Lynn Erwin @ 297-3163
M. Weinstein @ 265-5676 R. Zobel @ 278-4683
Secretary/Deputy Clerk

John Reese
Superior Court Judge

Certificate of Service

I, Karen Brinkmann, do hereby certify that on this 5th day of March 2001, copies of the foregoing **PETITION FOR RULEMAKING** were served via hand delivery, on the following:

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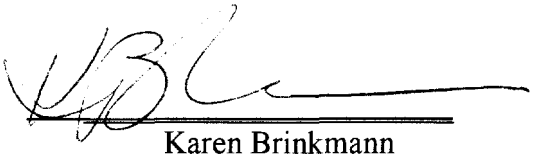

Karen Brinkmann